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Wolcott

Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Department of State--Reconsideration

File: B-244653.3

Date: May 15, 1992

Dennis J. Gallagher, Esq., Department of State, for the agency.
Glenn G. Wolcott, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's request for reconsideration is denied where request relies on factual assertions contrary to the record before the General Accounting Office.

DECISION

The Department of State (DOS) requests reconsideration of our decision in U.S. Defense Sys., Inc., B-244653.2, Dec. 23, 1991, in which we sustained U.S. Defense System's protest challenging the terms of invitation for bids (IFB) No. S-508-FA-825-A, issued by DOS for guard services at the United States Embassy in Kinshasa, Zaire. We concluded that the solicitation failed to comply with 22 U.S.C.A. § 4864 (West Supp. 1991), which requires that, for guard service contracts exceeding $250,000 entered into after February 16, 1990, DOS give preference to United States offerors that are price competitive with foreign offerors and are otherwise qualified to perform.

We deny the request for reconsideration.

In its protest filed on August 15, 1990, U.S. Defense Systems (USDS) asserted that various aspects of the solicitation failed to comply with statute and regulation. DOS filed its report with our Office on September 23, 1991, and USDS submitted comments on that report on October 7. In those comments, USDS elaborated on the general assertions made in its initial protest, and addressed in detail DOS' failure to comply with the domestic preference requirement of 22 U.S.C.A § 4864.

At DOS' request, we permitted it to formally respond to USDS' October 7 comments;[1] DOS filed its response with our Office on October 11. Despite USDS' detailed discussion in its October 7 comments regarding DOS' failure to comply with 22 U.S.C. § 4864, DOS' October 11 submission did not address that issue. Although DOS chose not to discuss the issue of compliance with 22 U.S.C.A. § 4864, DOS had recently provided our Office with its position regarding the requirements of that statute in responding to other protests raising the identical issue. Specifically, DOS had consistently asserted that the domestic preference requirements of 22 U.S.C.A. § 4864 were met through: (1) synopsis of the procurement in the Commerce Business Daily (CBD); and (2) allocation of greater weight to technical (rather than cost) factors in evaluating proposals. See Wackenhut, Int'l, Inc., B-241594, Feb. 14, 1991, 91-1 CPD ¶ 172. DOS maintained that these measures favored the "generally superior technical expertise" of domestic firms. Id.

We sustained USDS' protest on the basis that the IFB failed to provide the statutorily required preference for domestic offerors. We noted that, contrary to DOS' prior arguments concerning compliance with the statute, an evaluation scheme emphasizing technical evaluation factors over cost merely created a preference for technically superior firms--regardless of whether such firms were foreign or domestic.[2]

In its request for reconsideration, DOS asserts that our Office acted "arbitrarily and capriciously" in considering USDS' detailed discussion of 22 U.S.C.A. § 4864 in its October 7 comments, and asserts that we sustained the protest "without giving the Department notice and an opportunity to respond [to this issue]." DOS complains that "USDS' presentation of [the issue regarding violation of 22 U.S.C. § 4868] was so limited and ambiguous that the Department of State did not recognize it as a protest issue."

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[1]Normally, under our Bid Protest Regulations, the record is closed following submission of the protester's comments on the agency report. See 4 C.F.R. § 21.3(1) (1992).

[2]We also noted that publication in the CBD had no bearing on the domestic preference requirement of 22 U.S.C.A § 4864.

DOS' assertion that USDS' presentation was "limited and ambiguous" is contradicted by the record. In its comments, USDS quoted extensively from 22 U.S.C.A. § 4864 and devoted nearly two full pages to this issue alone, including the following discussion.

> "[T]he Diplomatic Security and Antiterrorism Act of 1986 ('Diplomatic Security Act'), 22 U.S.C. § 4801 et seq., as amended by the Foreign Relations Authorization Act for FY 1990 and 1991, Pub. L. 101-246, Title I, § 136, Feb. 16, 1990, 104 Stat. 33, establishes a State Department policy that (1) procedures be established to ensure that eligible United States ventures are not disadvantaged in the bid evaluation process for guard service contracts abroad; and (2) establishes a preference for United States persons and joint ventures for the performance of Foreign Service local guard contracts in excess of $250,000.00. Section 4864 of the Diplomatic Security Act as amended states, in pertinent part that:
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> > '(c) Participation of United States contractors in local guard contracts abroad
> >
> > 'With respect to local guard contracts for a Foreign Service building which exceed $250,000 and are entered into after February 16, 1990, [emphasis in USDS' submission] the Secretary of State shall --
> >
> > '(1) establish procedures to ensure that all solicitations for such contracts are adequately advertised in Commerce Business Daily;
> >
> > '(2) establish procedures to ensure that appropriate measures are taken by diplomatic and consular post management to assure that United States persons and qualified joint venture persons are not disadvantaged during the solicitation and bid evaluation process due to their distance from the post; and
> >
> > '(3) give preference to United States persons and qualified United States joint venture persons where such persons are price competitive to the non-United

> States persons bidding on the contract, are properly licensed by the host government, and otherwise qualified to carry out all terms of the contract.'

"There is no indication in the solicitation that the policies contained in the Diplomatic Security Act, as amended, were taken into account in the re-solicitation of the guard services contract at issue here. Particularly, Section M 'Evaluation Criteria for Award' of the IFB makes no mention of the evaluation preference established by 22 U.S.C. § 4864(c)(3) for qualified United States persons and joint ventures.

"Moreover, the IFB does not adhere to the policy of ensuring that eligible United States entities are not disadvantaged in competing for guard service contracts abroad."

We find that this discussion presents the issue in a clear and direct manner. USDS quoted the specific statutory provision of 22 U.S.C.A. § 4864(c)(3) requiring a preference for domestic offerors and explained how the DOS solicitation failed to meet that statutory requirement, stating that: "Section M . . . of the IFB makes no mention of the evaluation preference established by 22 U.S.C.[A.] § 4863(c)(3) for qualified United States persons." We believe that any reasonable reading of the submission by USDS should have made clear to the agency that compliance with 22 U.S.C.A. § 4864 was a protested issue.[3] Our Office specifically permitted DOS to respond to USDS' October 7 comments--which DOS did on October 11.

DOS' reconsideration request also challenges our decision finding USDS entitled to its protest costs. The agency maintains that "[h]ad the Department received proper notice

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[3]This is particularly true in light of the effort our Office has previously taken to bring the matter of noncompliance with 22 U.S.C.A. § 4864 to DOS' attention to permit timely corrective action. In Wackenhut Int'l, Inc., supra, the protester raised this issue only after the bid opening date; accordingly, the issue was untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), and we dismissed the protest on that basis. Nonetheless, our decision in Wackenhut specifically discussed our concern regarding DOS' apparent noncompliance with 22 U.S.C.A. § 4864, and, by separate letter dated February 14, 1991, we advised the Secretary of State of that concern.

and an opportunity to take corrective action, it might well have done so in time to moot the protest and so avoided protest costs."

In a document filed with our Office on October 16 in response to another protest alleging that another DOS solicitation failed to comply with 22 U.S.C.A. § 4864--1 week after DOS received the extensive USDS comments quoted above--DOS made the following statement:

> "[t]he Department contends that the objectives of [22 U.S.C.A. § 4864] are further met by the evaluation structure currently utilized by the Department for negotiated procurements. Numerical scoring schemes are utilized that assign a greater percentage of points to the technical portion of proposals. This method should greatly benefit a U.S. contractor over a foreign contractor because the U.S. contractor is expected to better understand the solicitation requirements and procurement procedures. Therefore, any advantage the local contractor may have had in the price area is significantly diminished. A 'preference' for U.S. contractors is built into an evaluation scheme that emphasizes technical expertise rather than low cost." (Emphasis added.)

In short, after DOS received USDS' October 7 comments, DOS was continuing to defend its position that the "evaluation structure currently utilized by the Department" complied with the domestic preference requirements of 22 U.S.C. § 4864 through an evaluation scheme emphasizing technical expertise over low cost. In light of these statements, we find unpersuasive DOS' argument that "had the Department received proper notice and an opportunity to take corrective action, it might well have done so in time to moot the protest and so avoided protest costs." Accordingly, the award of protest costs was appropriate.

The request for reconsideration is denied.

for James F. Hinchman
General Counsel